No. 90-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALFRED R. KUENNEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

MELVYN HARBURG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner violated 18 U.S.C. 1461, which prohibits causing obscene matter to be delivered by mail, when he ordered an obscene magazine from a supplier in Denmark and the magazine was subsequently delivered to his post office box.

2. Whether the fact that the obscene magazine was placed in petitioner's post office box by means of a controlled delivery after it had been intercepted by the Customs Service foreclosed petitioner's prosecution under 18 U.S.C. 1461.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 28-40) is reported at 901 F.2d 103.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1990. A petition for rehearing was denied on May 25, 1990 (Pet. App. 41). The petition for a writ of certiorari was filed on July 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of causing obscene matter to be delivered to him by mail, in violation of 18 U.S.C. 1461. He was sentenced to 3½ years' imprisonment. The court of appeals affirmed.

1. The evidence at trial showed that petitioner ordered a magazine, containing pictures of sexual activities between young boys, from a company in Denmark. In June 1984, the magazine, which was contained in an envelope addresed to petitioner, arrived in Chicago. Before the package was placed in the United States mail, it was examined by a Customs Service employee. The employee recognized the sending company's name on the envelope and suspected that the package contained obscene materials. The Customs Service opened the package, inspected its contents, and seized it. Pet. App. 29-30, 32.

After an investigation, the Customs Service arranged with the Postal Service to make a controlled delivery of the package to petitioner's post office box in St. Louis. On March 20, 1985, petitioner removed the package from his box. When a Customs agent confronted petitioner and advised him of his rights, petitioner handed the magazine to the agent and admitted that he had ordered it. A search of petitioner's residence disclosed additional pornographic material, which petitioner admitted ordering. Pet. App. 30-31.

Petitioner was convicted of violating 18 U.S.C. 1461 by causing the magazine to be delivered by mail. That statute provides that obscene articles are "nonmailable matter" and imposes criminal penalties on a person who

> knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section * * * to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof * * *.

2. The court of appeals affirmed. Pet. App. 28-40. The court rejected petitioner's contention that the prosecution was foreclosed by the fact that federal authorities had made a controlled delivery of the magazine nine months after it had been seized. The court noted that in *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954), this Court stated that when "one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Here, the court of appeals explained, "it was clear that, if the package had not been intercepted, the use of the mails would have followed 'in the ordinary course of business' and that such use could reasonably have been foreseen." Pet. App. 33. Thus, the court concluded, petitioner "did cause the mails to be used to deliver the package"; the court added that the delay between the package's interception and delivery was not relevant. *Ibid.*[1]

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[1] The court also rejected a number of other contentions. Pet. App. 35-40. The petition does not seek further review of those issues.

ARGUMENT

1. Petitioner contends that the "causes to be delivered by mail" clause of Section 1461 applies only to those who participate in sending obscene material by mail and does not extend to individuals who receive such material by mail after ordering it. Pet. 18-23.

The court of appeals' decision in this case is consistent with the only other appellate decision to construe the "causes to be delivered by mail" clause of Section 1461. *United States* v. *Johnson*, 855 F.2d 299, 305-306 (6th Cir. 1988). It is also consistent with a decision from the Ninth Circuit holding that a person who orders obscene material for delivery violates Section 1461 by "us[ing] the mails" for the delivery of that material. *United States* v. *Hurt*, 795 F.2d 765, 769-770 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987).[2] No court of appeals has held that those clauses of Section 1461 are inapplicable to persons who receive obscene material. The only case supporting petitioner's position is a 25-year-old district court decision. *United States* v. *Sidelko*, 248 F. Supp. 813 (M.D. Pa. 1965).

The prevailing interpretation of Section 1461 is well-founded. The statute prohibits "knowingly caus[ing]" obscene material "to be delivered by mail according to the direction thereon." As the Sixth Circuit explained in *Johnson*, that language is "clearly broad enough to encompass persons who order and receive obscene material for personal use and consumption and is not limited to persons who only place obscene material in the mail." 855 F.2d at 306.

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[2] See also *United States* v. *Dornhofer*, 859 F.2d 1195, 1198 n.1 (4th Cir. 1988) (citing *Hurt* with approval), cert. denied, 109 S. Ct. 1639 (1989).

An individual who, like petitioner, orders obscene material for delivery by mail knows that the material will be delivered by mail to the address he has provided and causes the material to be delivered in that manner.

In arguing that the "causes to be delivered by mail" clause does not apply to recipients of obscene material, petitioner relies primarily upon the dissenting opinion in the Sixth Circuit's decision in *United States* v. *Johnson*, *supra*. Pet. 19-22. Judge Merritt concluded in his dissent in *Johnson* that the "causes to be delivered by mail" clause should be limited to those who participate in sending obscene materials and should not be applied to recipients, even if the recipients order the materials for delivery by mail. 855 F.2d at 307-312.

Judge Merritt relied on two aspects of Section 1461's text. First, he maintained that, because the last clause of Section 1461 prohibits knowingly taking obscene material from the mails "for the purpose of circulating or disposing thereof," the "causes to be delivered by mail" clause cannot be applied to recipients of obscene material who do not intend to distribute it further. The "takes from the mails" clause, however, does not purport to limit the preceding clauses in the statute; the language of Section 1461 does not suggest that a recipient of obscene material who is not subject to prosecution under the "takes from the mails clause" is thereby rendered immune from prosecution under a different clause.

Second, Judge Merritt found support for his position in the fact that the "causes to be delivered by mail" clause prohibits deliveries of nonmailable matter "according to the direction thereon." That phrase, however, merely describes one of two types of deliveries that can violate the "causes to be de-

livered by mail" clause. A violation of that clause occurs either when a delivery by mail is "according to the direction thereon" or when the delivery is "at the place at which it is directed to be delivered by the person to whom it is addressed." Either type of delivery may be "caused" by a sender of obscene material or an addressee who orders material for delivery by mail. The fact that Section 1461 enumerates types or locations of delivery does not impose any limit on the class of persons who may be held to violate it.

Because there is no ambiguity in the statute, there is no need to resort to legislative history to determine its scope. See *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). In any event, however, the legislative history of the "causes to be delivered by mail" clause does not speak to the point at issue here. Before 1958, Section 1461 had two clauses, which applied, respectively, to anyone who "deposit[ed]" nonmailable matter "for mailing or delivery" and anyone who "[took] the same from the mails for the purpose of circulating or disposing thereof." 18 U.S.C. 1461 (1952). In *United States* v. *Ross*, 205 F.2d 619 (1953), the Tenth Circuit held that the first clause was violated only at the location where the nonmailable matter was actually deposited in the mails—thus limiting venue in such a prosecution to that district. To extend venue, Congress amended Section 1461 to prohibit "us[ing] the mails" to transmit nonmailable matter or "caus[ing]" nonmailable matter "to be delivered by mail" either at the place to which it is addressed or the point of actual delivery. The effect was to allow prosecutions not only in the district in which the obscene material was deposited in the mail, but also in districts through which the material travelled (see 18 U.S.C.

3231) and in which it was delivered. See H.R. Rep. No. 1614, 85th Cong., 2d Sess. (1958); S. Rep. No. 1839, 85th Cong., 2d Sess. (1958); H.R. Conf. Rep. No. 2624, 85th Cong., 2d Sess. (1958). While the legislative history of the 1958 Act indicates that recipients of obscene materials were among those the statute was designed to protect, the history does not manifest an intention to immunize persons who knowingly induce the use of the mails to transmit such materials. Nothing in the legislative history warrants a departure from the plain meaning of the statute.

Finally, Judge Merritt's interpretation rests on a false premise—the proposition that the pre-1958 version of Section 1461 could not be applied to persons who ordered obscene materials for their own use. Relying on legislative history suggesting that the addition of the "causes to be delivered by mail" clause was not viewed as an extension of the statute, he reasoned that the post-1958 version of Section 1461 carries forward the same limitation. Even if Congress had not enacted the "causes to be delivered by mail" clause in 1958, however, a person in petitioner's position would still have been subject to prosecution for aiding and abetting the mailing of obscene materials. The federal aiding and abetting statute, 18 U.S.C. 2(a), reaches everyone who "induces or procures" the commission of a crime; a person who orders an obscene magazine, knowing it to be obscene and knowing that it will be sent through the mails, clearly "induces or procures" the sender to deposit the material in the mail. The fact that the legislative history of the 1958 amendment does not indicate an intention to expand the class of persons subject to prosecution under Section 1461 does not undercut the validity of the prosecuton in this case,

because persons in petitioner's position were already subject to prosecution under the statute as aiders and abettors.

2. Relying on the fact that the obscene magazine he ordered from Denmark was placed in his post office box by means of a controlled delivery, petitioner argues that he was guilty at most of an attempt to violate Section 1461 and that the actions of federal authorities, rather than his own, caused the magazine to be delivered by mail. Pet. 23-25.

There is no merit to that contention. When petitioner ordered the magazine, he had "knowledge that the use of the mails [would] follow in the ordinary course of business," *Pereira* v. *United States*, 347 U.S. 1, 9 (1954). The fact that federal authorities became aware of the unlawful nature of the shipment and arranged for a controlled delivery does not give rise to any defense. See *United States* v. *Dornhofer*, 859 F.2d 1195, 1197-1198 & n.1 (4th Cir. 1988), cert. denied, 109 S. Ct. 1639 (1989); *United States* v. *Goodwin*, 854 F.2d 33, 36-37 & n.3 (4th Cir. 1988).[3] By ordering the obscene material, petitioner set in motion a transaction that would necessarily involve the use of the mails; federal authorities sim-

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[3] Both *Dornhofer* and *Goodwin* arose out of a government sting operation in which federal authorities solicited orders for child pornography and apprehended customers after making controlled deliveries to them. The Fourth Circuit upheld convictions under 18 U.S.C. 2252, rejecting contentions that the government had manufactured federal jurisdiction and that the controlled deliveries did not constitute a "mailing" within the meaning of Section 2252. In this case, federal authorities played a lesser role in causing the unlawful use of the mails. Instead of initiating the mailings, they merely delivered the package petitioner had ordered to the box to which it was addressed.

ply arranged for that transaction to proceed to its natural conclusion. This was not a case, in short, in which federal agents manufactured a crime or created a basis for federal jurisdiction. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Brantley*, 777 F.2d 159, 163 (4th Cir. 1985), cert. denied, 479 U.S. 822 (1986); *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973).

Nor is there any merit to petitioner's suggestion that the nine-month delay between the interception of the magazine and its delivery to his post office box broke the chain of causation. As the court of appeals held, the existence of a delay between the interception of the shipment and the controlled delivery "is not relevant to the question of causation." Pet. App. 33. The passage of time did not render petitioner any less responsible for the shipment's delivery by mail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

MERVYN HAMBURG
Attorney

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